90-191

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

DAVID M. BUCKLEY and JOHN E. REID AND ASSOCIATES, INC., an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COLORADO COURT OF APPEALS

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QUESTIONS PRESENTED

The following questions are presented by this Petition for Certiorari:

1. Whether Colorado law violates due process by allowing the jury to award punitive damages without adequate standards?

2. Whether Colorado law violates due process by allowing the jury to double up the punishment by awarding punitive damages in cases involving outrageous conduct?

3. Whether jury verdicts totaling $247,000.00 in this case violated due process by being grossly excessive and disproportionate?

4. Whether the violation of due process in this case was cured by the remittitur granted by the trial court on the award

for professional negligence and the judicial review of the awards for outrageous conduct and punitive damages?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, petitioner John E. Reid and Associates, Inc., states that it is an Illinois corporation. It does not have a parent company or nonwholly owned subsidiary.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

DAVID M. BUCKLEY
and
JOHN E. REID AND ASSOCIATES, INC.,
an Illinois corporation,
Petitioners,
vs.
TAMMIE R. ELLIS,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

David M. Buckley and John E. Reid and Associates, Inc., an Illinois corporation ("Buckley" and "Reid") respectfully petition for a writ of certiorari to review the judgment of the Colorado Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District Court of Adams County, Colorado, is unreported (App., infra, A 1 to A 10). The opinion of the Colorado Court of Appeals (App., infra, B 1 to B 17) is reported as Tammie R. Ellis v. David M. Buckley, et al., No. 87 CA 1322 (November 16, 1989) 790 P.2d 875 (Colo. App. 1989).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1251(a).

The judgment of the Colorado Court of Appeals was entered on November 16, 1989. A timely petition for rehearing

was denied by the Colorado Court of Appeals on January 11, 1990 (App., infra, C 1). A timely petition for certiorari was denied by the Supreme Court of Colorado on April 30, 1990 (App., infra, D 1 and D 2). A petition for reconsideration was striken by the Supreme Court of Colorado on May 11, 1990 (App., infra, E 1 and E 2). The mandate was issued by the Colorado Court of Appeals on May 10, 1990 (App. infra, F 1) and was recalled by the Colorado Court of Appeals on May 18, 1990 (App., infra, G 1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fifth Amendment to the United States Constitution provides, in relevant part:

> "No person shall . . . be subject for the same offense to be twice put in jeopardy of life or limb; nor shall he be compelled in any criminal case to be a witness against himself, nor be deprived

> of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

2. The Fourteenth Amendment, Section 1, of the United States Constitution provides, in relevant part:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

3. During the time period applicable to this case, the Colorado Revised Statutes provided for punitive damages in Section 13-21-102 C.R.S. (1973), as follows:

> **Exemplary Damages.** In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and

> feelings, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages.

STATEMENT OF THE CASE

A. THE PARTIES

Petitioner David M. Buckley ("Buckley") is a polygraph examiner employed by John E. Reid and Associates, Inc., and petitioner John E. Reid and Associates, Inc. ("Reid") is an Illinois corporation engaged in performing employee theft investigations on behalf of employers.

Respondent Tammie Ellis ("Ellis") was a cashier at Fashion Bar's Northglenn store and was administered a polygraph examination and interviewed by Buckley during an internal theft investigation in February, 1984.

B. THE ACTION BELOW

Ellis was terminated by Fashion Bar after she failed a polygraph examination

during the internal theft examination. In May, 1984, she sued Fashion Bar, Buckley, who administered the polygraph examination, and Reid. Prior to trial, she settled with Fashion Bar.

1. Proceedings in the Trial Court

(A) Ellis' Claims

Ellis alleged that Buckley was negligent in finding that she was deceptive on the polygraph examination and that Buckley had intentionally inflicted emotional distress upon her through his outrageous conduct. She claimed compensatory damages of $8,400 for lost wages and $3,000 for lost medical benefits related to the delivery of her first child. (Tr., Vol. III 141 and 144).

(B) The Verdicts

The jury returned three verdicts for Ellis: $74,000 on her claim

for professional negligence, $48,000 on her claim for intentional infliction of emotional distress by outrageous conduct, and $125,000 on her claim for punitive damages.

(C) **The Post-Trial Motions**

Buckley and Reid filed motions for post-trial relief requesting a judgment notwithstanding the verdict or a remittitur on all three claims. The trial court granted the motion for a new trial on the professional negligence claim subject to Ellis' accepting a remittitur in the amount of $62,600. The remaining post-trial motions were denied (App., infra, A 1 to A 10). Ellis accepted the remittitur and the verdict on her claim for professional negligence was reduced from $74,000 to $11,400, which consisted of $8,400 in lost wages and $3,000 in lost medical benefits related to the delivery of Ellis' first child.

2. The Appeal to the Colorado Court of Appeals

Buckley and Reid filed a timely appeal. In a split decision filed on November 16, 1989, the Colorado Court of Appeals affirmed the three verdicts for Ellis -- $125,000 on her claim for punitive damages, $48,000 on her claim for outrageous conduct, and $11,400 on her claim for professional negligence (App., infra, B 1 to B 10).

Justice Hodges dissented, finding, among other things, that the punitive damage award of $125,000 was not sustainable (App., infra, B 11 to B 17).

Buckley and Reid filed a timely petition for rehearing, which was denied by an order entered on January 11, 1990. Justice Hodges would have granted the petition for rehearing (App., infra, C 1).

3. Petition for Certiorari to the Supreme Court of Colorado

Buckley and Reid filed a timely petition for certiorari. The Supreme Court of Colorado denied the petition in an order entered on April 30, 1990. Justice Rovira would have granted certiorari on whether the Court of Appeals erred in upholding the jury's punitive damage award (App., infra, D 1 and D 2). Buckley and Reid filed a petition for reconsideration which was stricken by the Supreme Court of Colorado in an order entered on May 11, 1990 (App., infra, E 1 and E 2).

C. STATEMENT OF FACTS

1. The Internal Theft Investigation at Fashion Bar

Ellis was a cashier at Fashion Bar's Northglenn store from May, 1983 to February, 1984 (Tr. Vol. III, pp. 96-97). The store had miscellaneous

cash shortages of $1,800 (Tr. Vol. V, p. 459). Reid was hired by Fashion Bar to conduct an internal theft investigation in early February, 1984. Sixteen Fashion Bar employees were administered polygraph tests and interviewed. Buckley administered polygraph examinations and interviewed ten of the employees, including Ellis (Vol. X, Ex. F).

2. **Evidence Pointing to Ellis' Guilt**

Prior to administering a polygraph examination and interviewing Ellis, Buckley had been told by another Fashion Bar employee that she had seen Ellis take some money from the cash register at Fashion Bar and place it in an envelope containing her personal cancelled checks. The other employee also stated that she saw Ellis place the envelope under her desk, and that she thought Ellis was

probably stealing the money, because it was not normal procedure for cashiers to remove money from the register in this fashion (Vol. X, Ex. F).

The other Fashion Bar employee could not be located at the time of trial and did not testify. When this matter came up in the trial court, Ellis' counsel objected to that portion of Buckley's report containing the accusation as hearsay. In response, the trial court "whited out" Ellis' name as the person accused of theft on the copy of Buckley's report that went to the jury. However, so that it would be available on appeal, the trial court placed a complete copy of the report, without deletions, in a sealed envelope and made it part of the record (Tr. Vol. 4A, p. 592).

3. Ellis' Polygraph Examination

Prior to the polygraph examination, Ellis signed a written consent to disclosure of the test results and any relevant statements made by her to Fashion Bar (Vol. X, Ex. A).

During the examination, Buckley asked Ellis the following questions (Vol. X, Ex. 1):

(1) Did you steal any merchandise from Fashion Bar?

(2) Did you steal any money from Fashion Bar?

(3) Do you know of any present employee stealing from Fashion Bar?

(4) Did you falsify any company records to steal from Fashion Bar?

(5) Did you give any unauthorized discounts at Fashion Bar?

Buckley found that there were significant emotional responses indicative of deception when Ellis was asked questions about

stealing merchandise and money and having knowledge of other employees doing so. Ellis' emotional responses on the remaining questions were such that Buckley was unable to render an opinion of truth or deception (Vol. X, Ex. F). After scoring the charts, Buckley told Ellis that he found indications of deception (Tr. Vol. III, p. 108).

4. Ellis' Post-Test Interview

Buckley then commenced the post-test interview by telling Ellis about different cases that he had in the past of people who had stolen money (Tr. Vol. III, p. 108). Ellis said Buckley wanted to know how much she had taken. Buckley asked her if she had taken $100, if she had taken $50, and if she had taken $10. She told him that she had not taken anything. She does not know how many times he asked her if she had taken anything

from Fashion Bar -- maybe twelve times (Tr. Vol. III, pp. 109-110).

According to Ellis' testimony, Buckley did not appear to believe her and did not give her a chance to talk. He was excited and talked fast. He was short and sharp and she felt as if he wanted a confession from her (Tr. Vol. III, p. 126). Buckley said that there might be something minor that she was not accounting for. She told him that she was not stealing things, but was exchanging wheat pennies. She testified that he drilled her on that and then asked her if there was something else she had taken. She told him that she had not paid for a bag of potato chips (Tr. Vol. III, p. 111), explaining she did not have enough money and owed ten cents, but did pay it later (Tr. Vol. III, p. 112).

The post-test interview lasted two hours. Buckley did not tell her that she had to stay (Tr. Vol. IV, p. 127), nor did she ever ask to leave. She did not at any time ask Buckley, "Can I go?", "Are you finished?", "Is this done?", or words to that effect. She did not ask because he continued to talk to her and for no other reason (Tr. Vol. IV, p. 163).

5. Ellis' Emotional Distress

When she told Buckley about the wheat pennies and potato chips, Ellis started crying and he handed her a tissue. She asked him to leave the room and he did. When he came back in, he started questioning her again (Tr. Vol. III, pp. 112-113). Ellis did not say how long Buckley questioned her after she started crying. Buckley stated that

he talked to her for three or four, maybe five more minutes (Tr. Vol. IV, p. 595).

Ellis' husband was waiting for her and she left with him (Tr. Vol. III, p. 114). Her husband took her back to Fashion Bar, where she was supposed to work that night. According to her, she was too upset to work and her manager let her off. Her husband took her home (Tr. Vol. III, p. 114).

6. Ellis' Suspension and Termination by Fashion Bar

The day after her polygraph examination and interview, Ellis returned to the store and was told she was suspended for having failed the polygraph test. Three days later, Fashion Bar terminated her. (Tr. Vol. IV, pp. 129-137).

7. Ellis' Failure to Seek Medical Care for Her Claimed Emotional Distress

Ellis did not consult a psychiatrist or psychologist. She has not had

counseling, other than from her pastor. She has not taken any prescription medication -- just an aspirin or two for headaches (Tr. Vol. IV, pp. 154-155).

8. The Expert Testimony

Ellis produced two expert witnesses who testified that Buckley should have scored her polygraph charts as inconclusive rather than deceptive. However, neither of Ellis' expert witnesses found that Ellis' charts should have been scored as truthful. Nor did they find any fault with the way Buckley conducted himself during the polygraph examination or post-test interview. They did not testify that he treated Ellis improperly or that he should not have questioned her as he did or for as long as he did (Tr. Vol IV, pp. 204-304 (Backster); and Tr. Vol. IV, pp. 309-329 (Smith)).

9. The Trial Court's Rulings on Emotional Distress

The trial court made two rulings concerning recovery for emotional distress. Prior to trial, Buckley and Reid's motion for summary judgment on Ellis' claim for negligent infliction of emotional distress was granted and all claims for emotional distress resulting from any negligence in connection with the polygraph examination were dismissed (Tr. Vol. II, p. 427, Entry dated April 2, 1987). At the close of the evidence, the trial court ruled that any emotional distress caused by outrageous conduct must be confined to that which resulted from the post-test interview. The trial court ruled that, as a matter of law, the report of Ellis' failure to pass the examination could not be deemed outrageous conduct and that any emotional

distress related to that report or her failure to pass the examination was not actionable (Tr. Vol. IX, pp. 919-920).

10. Jury Instruction on Punitive Damages

The trial court gave the following instruction on punitive damages:

INSTRUCTION NO. 26

> If you find in favor of the plaintiff, Tammie R. Ellis, and award her actual damages for negligence or for her claim of outrageous conduct, then you should consider whether the plaintiff is entitled to exemplary damages. If you also find beyond a reasonable doubt that the injury complained of was attended by circumstances of insult or a wanton or reckless disregard of the rights and feelings of the plaintiff, then in addition to any actual damages, you may also award the plaintiff a reasonable sum as exemplary damages.
>
> Exemplary damages are not to be construed as compensation to the plaintiff for wrong done, but as punishment to the defendant, and as an example to others.

REASONS FOR GRANTING THIS PETITION

The remedy of punitive damages has deep roots in ancient law and medieval

English statutes. It was expressly addressed for the first time in Huckle v. Money, 2 Wils. 205 (K.B. 1763), where the plaintiff was imprisoned pursuant to "a nameless warrant." The jury was found justified in awarding damages beyond the small injury done to the plaintiff because of the desirability of taking into account "a most daring public attack made upon the liberty of the subject." Id. at 206.

The punitive damage remedy was recognized in America and, by the middle of the last century, gained substantial acceptance in this country. See Owens, Punitive Damages in Product Liability Litigation, 74 Mich. L.Rev. 1258 (1976). The purpose behind the imposition of punitive damages was, and continues to be, to punish the defendant for the commission of an aggravated or outrageous

act of misconduct and to deter him and others from such conduct in the future.

Although the remedy of punitive damages is now firmly established by statute in many states and as part of the common law in others, it has become the subject of great abuse. In the recent past, punitive damages have changed from a remedy reserved for the exceptional case of particularly fraudulent or malicious behavior to a commonplace part of virtually every tort action. The unpredictable, discretionary nature of those awards is having an in terrorem effect on not only defendants, but also plaintiffs against whom "defensive" counterclaims are filed.

Juries have been given free reign to punish selectively, to indulge bias, prejudice and any wealth distribution inclinations they may have, and to exercise standardless discretion to render

awards bearing no necessary relationship to actual harm caused.

This Court has before it a case in which it will shortly decide whether the procedures used in civil punitive damage cases violate due process. Pacific Mutual Life Insurance Company v. Cleopatra Haslip, 553 So.2d 537 (1989). Certiorari to this Court was granted on April 2, 1990 (No. 89-1279). Previously, six justices of this Court had expressed concern that the way in which juries were allowed to award punitive damages in this country may be violating due process.

In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed. 2d 219 (1989), Justice Brennan, joined by Justice Marshall, separately concurred in an opinion which clearly stated the

views of those Justices that serious due process issues exist as to punitive damages awards under present law.

Justice Brennan wrote, at pages 241-242:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damages awards that are grossly excessive, Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111, 53 L.Ed. 417, 29 S.Ct. 220 (1909), or so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable, St. Louis, I.M.&S.R. Co. v. Williams, 251 U.S. 63, 66-67, 64 L.Ed.139, 40 S.Ct. 71 (1919). See also Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491, 59 L.Ed. 1419, 35 S.Ct. 886 (1915); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 522-533, 29 L.Ed. 463, 6 S.Ct. 110 (1885).
>
> * * *
>
> Without statutory (or at least common law) standards for the determination of how large an award of punitive damages is appropriate in a given case, juries are left largely to themselves in making this important, and potentially devastating, decision.

Justice O'Connor, joined by Justice Stevens, separately concurred, and joined in Justice Brennan's view that the due process issues remain open, stating, at page 243:

> Moreover, I share Justice Brennan's view, ante, at ___, ___, 106 L.Ed.2d 241-242, that nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed, and I adhere to my comments in Bankers Life & Casualty Co. v. Crenshaw, 486 U.S. 71, 86-89, 100 L.Ed.2d 62, 108 S.Ct. 1645 (1988)(opinion concurring in part), regarding the vagueness and procedural due process problems presented by juries given unbridled discretion to impose punitive damages.

Justice O'Connor's concurrence in Bankers Life & Casualty v. Crenshaw was joined in by Justice Scalia.

Further, in Smith v. Wade, 461 U.S. 30 (1983), Chief Justice Rehnquist wrote a sharp dissent against the allowance of punitive damages in 42 U.S.C. Section 1983 actions.

1. COLORADO LAW VIOLATES DUE PROCESS BY ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES WITHOUT ADEQUATE STANDARDS.

Punitive damages must be awarded under constitutionally adequate standards to guide jurors and courts as to when they should be imposed, and as to how much is appropriate to punish and deter. Mathews v. Eldridge, 424 U.S. 319, 334 (1976); Coates v. Cincinnati, 402 U.S. 611, 614 (1971); Kollender v. Lawson, 461 U.S. 352, 358 (1983); Bankers Life & Casualty v. Crenshaw, 486 U.S. 71 (1988)(concurring opinion); Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. ___, 109 S.Ct. 2909, 106 L.Ed.2d 219 (1989).

Under Colorado law, punitive damages are a creature of statute, i.e., Section 13-21-102 C.R.S. (1973). That statute, as it existed at the time this action arose, did not contain standards adequate

to meet the requirements of due process. It provided as follows:

> **Exemplary damages.** In all civil actions in which damages are assessed by a jury for a wrong done to the person, or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or insult, or a wanton and reckless disregard of the injured party's rights and feelings, the jury, in addition to the actual damages sustained by such party may award him reasonable exemplary damages.

This statute and the punitive damages instruction given in this case (Statement of Facts, supra, Par. 10) violated due process because they allowed the jury to award punitive damages in any amount it deemed reasonable for conduct which was no more offensive than insulting. The decision as to whether or not to award punitive damages and the amount thereof was left to the moral discretion of the jury.

The constitutional invalidity of this type of situation was described by this

Court in Coates v. Cincinnati, 402 U.S. 611, 614 (1971) as follows: "Many types of behavior can be restricted or even prohibited but not constitutionally, 'through the enactment and enforcement of an ordinance whose violation may entirely depend upon whether or not a (law enforcement officer) is annoyed . . .'" Nor may juries be allowed to pursue their personal predilections. Kollender v. Lawson, 461 U.S. 352, 358 (1983); and Smith v. Goguen, 415 U.S. 566, 575 (1974).

After this case arose, the Colorado legislature amended Section 13-21-102 C.R.S. to adopt certain standards to guide jurors and courts. It now provides as follows:

> **Exemplary damages.** (1) (a) In all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained

of is attended by circumstances of fraud, malice, or willful and wanton conduct, the jury, in addition to the actual damages sustained by such party, may award him reasonable exemplary damages. The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

(b) As used in this section, "willful and wanton conduct" means conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety of others, particularly the plaintiff.

(2) Notwithstanding the provisions of subsection (1) of this section, the court may reduce or disallow the award of exemplary damages to the extent that:

(a) The deterrent effect of the damages has been accomplished; or

(b) The conduct which resulted in the award has ceased; or

(c) The purpose of such damages has otherwise been served.

(3) Notwithstanding the provisions of subsection (1) of this section, the court may increase any award of exemplary damages, to a sum not to exceed three times the amount of actual damages, if it is shown that:

(a) The defendant has continued the behavior or repeated the action which is the subject of the claim

against the defendant in a willful and wanton manner, either against the plaintiff or another person or persons, during the pendency of the case; or

(b) The defendant has acted in a willful and wanton manner during the pendency of the action in a manner which has further aggravated the damages of the plaintiff when the defendant knew or should have known such action would produce aggravation.

(4) One-third of all reasonable damages collected pursuant to this section shall be paid into the state general fund. The remaining two-thirds of such damages collected shall be paid to the injured party. Nothing in this subsection (4) shall be construed to give the general fund any interest in the claim for exemplary damages or in the litigation itself at any time prior to payment becoming due.

(5) Unless otherwise provided by law, exemplary damages shall not be awarded in administrative or arbitration proceedings, even if the award or decision is enforced or approved in an action commenced in a court.

(6) In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

The amended punitive damage statute is still deficient because it fails to

guide the jurors as to the circumstances in which fraud, malice or willful and wanton conduct should be punished and fix a definite upper limit therefor, such as a maximum fine in a criminal case. Limiting the punitive damages to an amount not to exceed the actual damages may only encourage a jury to award more actual damages so as to increase the punitive damage award.

Also, amended Section 13-21-102 fails to provide for a bifurcated trial, where the trial is divided between one addressing liability, wherein the burden of proof is by a preponderance of the evidence, and one focusing on punitive damages, wherein the burden of proof is beyond a reasonable doubt. Colorado law provides that punitive damages must be proven beyond a reasonable doubt. Section 13-25-127(2), C.R.S. (1973).

Given meaningful standards, and a bifurcated trial, punitive damages would not have been awarded in this case. Firstly, the record here shows that this was a single, isolated event involving only Ellis. There is no evidence that Buckley had wronged any other persons to whom he administered polygraph examinations or interviewed. Secondly, there is no evidence that Reid was some fly-by-night investigative firm operating without scruples on the edge of the law. In fact, John E. Reid (who founded the Reid organization in 1947) and Professor Fred E. Inbau co-authored the authoritative texts in the field, i.e., "Truth and Deception: The Polygraph ('Lie-Detector') Technique" (The Williams & Wilkins Co., 1966 and 1977), and "Criminal Interrogations and Confessions" (The Williams & Wilkins Co., 1962 and 1967). There is

nothing in this record to show that Buckley and Reid needed strong punishment to "straighten them out," so to speak.

2. COLORADO LAW VIOLATES DUE PROCESS BY ALLOWING THE JURY TO DOUBLE UP THE PUNISHMENT BY AWARDING PUNITIVE DAMAGES IN CASES OF OUTRAGEOUS CONDUCT.

The tort of outrageous conduct is itself punitive in nature. Givelber, The Right to Minimum Social Decency and the Limits of Evenhandedness: Intentional Infliction of Emotional Distress by Outrageous Conduct, 82 Colum. L. Rev. 42 (1982). Unlike other torts which compensate victims for their injuries, damages for the tort of outrageous conduct often depend more on the character of the conduct than the extent of the plaintiff's injury. The emotional damages awarded normally exceed both the plaintiff's out-of-pocket expenses due to the injury and

any economic goal which the defendant may have sought through his outrageous conduct. Therefore, according to Professor Givelber, emotional damages in outrageous conduct cases serve the policy of deterrence, which also underlies punitive damages. Id. at 52-54.

Ellis had no out-of-pocket expense regarding her claim for outrageous conduct. She did not consult a psychiatrist or psychologist. She did not have any counseling, other than from her pastor. She did not take any prescription medication -- just an aspirin or two for headaches (Tr. Vol. IV, pp. 154-155). At most, Ellis suffered a few minutes of tears near the end of the post-test interview and an evening of being upset (Tr. Vol. III, pp. 112-114 and Tr. Vol. IV, p. 595).

The jury awarded Ellis $48,000 on her claim for outrageous conduct to punish Buckley and Reid. That should have been enough for the small amount of emotional distress suffered by Ellis. But it was not. Given the opportunity to do so under Colorado law, the jury doubled up the punishment by also awarding Ellis $125,000 on her claim for punitive damages.

Justice Hodges, in his dissent to the decision of the Court of Appeals, stated:

> I would also reverse that part of the judgment awarding $125,000 to the plaintiff as exemplary damages on her claims of outrageous conduct and negligence, and remand to the trial court for a new trial on exemplary damages only.
>
> I believe the $125,000 is not sustainable for two reasons.
>
> First, there is a real and significant question of law concerning whether this plaintiff may be awarded $48,000 in damages for outrageous conduct and also be awarded $125,000

> as exemplary damages for outrageous conduct and negligence. Exemplary damages and damages for outrageous conduct are both directed toward deterrence and as punishment for intentional or reckless misconduct. Therefore, it would appear that the part of the exemplary damage award applicable to outrageous conduct is duplicative of the award for outrageous conduct. On this basis, the defendant is being doubly punished. (App., infra, B 13 and B 14).

As pointed out by Justice Hodges, in jurisdictions other than Colorado, the courts have declined to award both punitive damages and damages for outrageous conduct because they are duplicative. See, e.g., Knierim v. Izzo, 22 Ill.2d 73, 174 N.E.2d 157, 162 (1961). In that case, the Illinois Supreme Court adopted the tort of outrageous conduct. The Court, however, concluded that punitive damages could not be sanctioned as an additional recovery in such an action:

> There remains the question of whether a request for punitive damages in such an action is proper. Whether punitive damages may be assessed in

> a particular case is properly a question of law. (Citation omitted.) Generally, such damages may be recovered in cases where the wrongful act complained of is characterized by wantonness, malice, oppression, or circumstances of aggravation. (Citation omitted.) The alleged conduct of the defendant in intentionally causing the severe emotional disturbance is characterized by these elements. Indeed, it is the outrageous nature of this conduct that forms the basis of the action.
>
> We believe, nevertheless, the punitive damages cannot be sanctioned as an additional recovery in such an action. Since the outrageous quality of the defendant's conduct forms the basis of this action, the rendition of compensatory damages will be sufficiently punitive.

Doubling up the damages is a violation of due process. The fact that punishment, i.e., retribution and deterrence, is imposed in civil actions among private litigants does not insulate the matter from due process scrutiny. A. B. Small v. American Sugar Refining Co., 267 U.S. 233, 239 (1925); Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); Giaccio v.

Pennsylvania, 382 U.S. 399, 401-403 (1966); and Jacobs v. Board of School Commissioners, 490 F.2d 601, 605 (7th Cir. 1973).

The level of scrutiny should be similar to that applied to criminal sanctions. As noted in prior decisions of this Court, punitive damage awards are quasi-criminal (Smith v. Wade, 461 U.S. 30, 59 (1983), Rehnquist, J. dissenting); serve the same function as criminal penalties (Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 82-84 (1971), Marshall J. dissenting); and are private fines imposed to punish and deter conduct (Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974). When so scrutinized, it is evident that allowing a jury to double up the punishment in outrageous conduct cases violates due process.

3. JURY VERDICTS TOTALING $247,000 IN THIS CASE VIOLATED DUE PROCESS BY BEING GROSSLY EXCESSIVE AND DISPROPORTIONATE.

In Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. ___ , 109 S.Ct. 2909, 2923, 106 L.Ed.2d 219 (1989), Justice Brennan, in his concurrence, suggested that Due Process forbids excessive damages in civil cases, stating:

> Several of our decisions indicate that even where a statute sets a range of possible civil damages that may be awarded to a private litigant, the Due Process Clause forbids damage awards that are 'grossly excessive,' Waters-Pierce Oil Co. v. Texas, 212 U.S. 86, 111 (1909), or 'so severe and oppressive as to be wholly disproportionate to the offense and obviously unreasonable,' St. Louis, I.M.&S.R. Co. v. Williams, 251 U.S. 63, 66-67 (1919); see also Southwestern Telegraph & Telephone Co. v. Danaher, 238 U.S. 482, 491 (1915); Missouri Pacific Railway Co. v. Humes, 115 U.S. 512, 522-523 (1885).

The economic damage sought by Ellis was $11,400 -- $8,400 for lost wages

and $3,000 for lost medical benefits related to the delivery of her first child (Tr., Vol. III 141 and 144). In his closing arguments, Ellis' attorney told the jury:

> I think in terms of damages. Tammie's economic damages are quite clear. She lost her job; she was out of the market for about a year; she lost medical benefits worth $3,000, and what amounts to a year's wages at her level -- were $8,400, so that's $11,400." (Tr., Vol. VI, p. 981).

Nonetheless, the jury awarded Ellis $74,000 for professional negligence, as well as $48,000 for outrageous conduct and $125,000 for punitive damages -- a total of $247,000, as against $11,400 in economic damages.

This Court has expressed concern for proportionality of punishment. The general rule is that the punishment must not be grossly out of proportion to the severity of the offense. (Trop v. Dulles,

356 U.S. 86 (1958); Gregg v. Georgia, 428 U.S. 153 (1976); Pyler v. Doe, 457 U.S. 202 (1982); and Solem v. Helm, 463 U.S. 277 (1983).

The $247,000 awarded by the jury did not fit the harm suffered by Ellis or the offensiveness of Buckley's conduct. At most, Ellis suffered a few minutes of tears near the end of the post-test interview and an evening of being upset. (Tr. Vol. III, pp. 112-114, and Tr. Vol. IV, p. 595). At most, Buckley made a mistake in scoring Ellis' polygraph charts, finding her deceptive rather than inconclusive. Neither of Ellis' experts found that Ellis' charts were truthful. Although Ellis complained about the manner and period of time during which she was interviewed following the polygraph examination, neither of her experts testified that

Buckley treated Ellis improperly or that he should not have questioned her as he did or for as long as he did (Tr. Vol. IV, pp. 204-304 (Backster) and Tr. Vol. IV, pp. 309-329 (Smith)).

Assuming Buckley's conduct was criminal, no court would have been allowed to fine him $247,000. The jury verdicts totaling that amount violated due process. They were grossly excessive and disproportionate to both the harm suffered by Ellis and the offensiveness of Buckley's conduct.

4. THE VIOLATION OF DUE PROCESS IN THIS CASE WAS NOT CURED BY THE REMITTITUR GRANTED BY THE TRIAL COURT ON THE AWARD FOR PROFESSIONAL NEGLIGENCE AND THE JUDICIAL REVIEW OF THE AWARDS FOR OUTRAGEOUS CONDUCT AND PUNITIVE DAMAGES.

The trial court granted the motion for a new trial on the professional negligence claim subject to Ellis' accepting a remittitur in the amount of $62,000 (App., infra, A 5). Ellis

accepted the remittitur and the verdict was reduced from $74,000 to $11,400, which consisted of $8,400 in lost wages and $3,000 in lost medical benefits related to the delivery of Ellis' first child.

However, the remittitur did not cure the violation of due process resulting from the award of $48,000 for outrageous conduct and the award of $125,000 for punitive damages. Together, they are grossly excessive and disproportionate. The problem is that neither the trial court nor the Court of Appeals applied meaningful standards in reviewing these awards.

With respect to Ellis' claim for outrageous conduct, the trial court stated that it "should not and will not set aside a verdict as here entered unless it is grossly and manifestly unjust or

excessive or unless it is the result of bias, prejudice or passion." (App., infra, A 7). Regarding Ellis' claim for punitive damages, the trial court stated that while it did "believe the award was extremely high based upon the evidence in this case, the Court cannot say or find, as a matter of law, that the verdict was excessive or that the jury was motivated by passion or prejudice in reaching its verdict." (App., infra, A 7 and A 8).

The majority on the Court of Appeals did not address the question of whether the outrageous conduct award was excessive, although it was raised by Buckley and Reid. With respect to punitive damages, it merely stated: "An award of damages will not be disturbed on appeal unless it is completely unsupported by the record. Meiter v. Cavanaugh, supra." (App., infra, B 10).

The standard applied by the trial court was whether the outrageous damage award and punitive damage award was:

a. grossly and manifestly unjust or excessive, or

b. the result of bias, prejudice or passion.

These are both subjective value judgments and essentially unreviewable. What would be grossly and manifestly unjust or excessive to one trial judge might not be to another trial judge. Also, how can a trial judge discern bias, prejudice or passion on the part of the jury? The fact is that it cannot do so in any objective way. It is not customary for a trial judge to question the jurors on how they arrived at their damage awards and the trial judge did not do so in this case.

The standard applied by the majority on the Court of Appeals was whether the

punitive damage award was completely unsupported by the record. That is not a meaningful standard. Presumably, a "scintilla" of evidence would be enough to support a punitive damage award. In his dissent, Justice Hodges found that the punitive damage award was not sustainable because it constitued double punishment and because it did not bear some relation to actual damages (App., infra, B 13 and B 14). Also, Supreme Court of Colorado Justice Rovira would have granted certiorari on "whether the Court of Appeals erred in upholding the jury's exemplary damage award." (App., infra, D 1 and D2).

Where, as here, there are no meaningful standards to guide the trial court and Court of Appeals, their review of the amount of damages awarded by the jury is meaningless. Courts, no more

than juries, can be given unbridled discretion to determine the amount of punishment after the defendant has acted. (Grayned v. City of Rockford, 408 U.S. 104, 108-109 (1972); Marks v. United States, 430 U.S. 188, 191-192 (1977); Bouie v. Columbia, 378 U.S. 347 (1964). The vice of vague standards is that no meaningful review can be made. (Roberts v. United States Jaycees, 468 U.S. 609, 629 (1984)).

Neither the remittitur granted by the trial court on Ellis' claim for professional negligence, nor the review of the awards for outrageous conduct and punitive damages cured the constitutional defect in this case.

CONCLUSION

This Court has an opportunity in Pacific Mutual to require that punitive damages be awarded in a way which complies

with due process standards. Certain of the issues in Pacific Mutual are also found in this case. However, Pacific Mutual did not involve a claim for outrageous conduct and does not contain a question regarding double punishment by awarding punitive damages in outrageous conduct cases. That question needs to be resolved and can be resolved in this case. Buckley and Reid respectfully request that a petition for writ of certiorari be granted in this case.

July 26, 1990

Respectfully submitted,

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APPENDICES

DISTRICT COURT, COUNTY OF ADAMS, STATE OF COLORADO

CIVIL ACTION NO. 84CV1083, DIVISION A

RULINGS REGARDING DEFENDANTS' MOTIONS FOR POST-TRIAL RELIEF - RULE 59 C.R.C.P.

TAMMIE R. ELLIS,

Plaintiff,

vs.

FASHION BAR, INC., a Colorado corporation, DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc., and JOHN E. REID & ASSOCIATES, INC., an Illinois corporation,

Defendants.

Defendants have filed their "Motion for Post-Trial Relief - Rule 59, C.R.C.P." The Motion requests judgment notwithstanding the verdict, new trial or remittitur as against verdicts for the plaintiff on the theories of professional negligence,

outrageous conduct, and punitive damages.

I.

Judgement Notwithstanding the Verdict

A. Professional Negligence Claim

Defendants move for judgment notwithstanding the verdict pursuant to C.R.C.P. 59 (e) alleging (1) the evidence to support the verdict was insufficient as a matter of law, and (2) no genuine issue of material fact exists concerning the issue of professional negligence and defendants are entitled to judgment as a matter of law.

The record shows the evidence on trial was lengthy, disjointed and in many aspects confusing. However, when considered as a whole, and in the light most favorable to the verdict, the Court finds it was sufficient to sustain the verdict

of the jury. Clearly, more than one conclusion could have been drawn by reasonable minds including a conclusion that defendants were professionally negligent. While defendants in their post-trial motion focus upon the test scoring alone, there was evidence to show both the standard of care and a breach thereof on many aspects of the polygraph examination involved in this action. Genuine issues did exist which were properly within the province of the jury to determine.

II.

Motion for New Trial or Remittitur

A. Negligence Claim

Defendants' Motion for New Trial on the negligence claim is predicated soley upon the assertion that the damages awarded were excessive. A new trial may

be granted under C.R.C.P 59 (d) (5) in such instances. In the alternative, the defendant seeks a remittitur of all amounts in excess of $11,400.00. The Court agrees with the Defendant in this argument.

The jury's verdicts on the negligence, outrageous conduct and punitive damage claims were separately stated. As such, there is no confusion as to the amount specifically awarded for defendants' negligence. The evidence presented on trial would support an award of actual damages based upon defendants' negligence of $8,400.00 in lost wages and $3,000.00 in lost medical insurance benefits. The evidence would support no larger award. The verdict in the amount of $74,000.00 for the negligence claim is grossly and

manifestly excessive considering the evidence in this case. The Court, however, finds the verdict is not the result of any improper bias, prejudice or passion.

Under the circumstances the Court finds that defendants' Motion for a New Trial under C.R.C.P. 59 (d) (5) should be granted conditionally on the negligence claim only. If plaintiff accepts a remittitur of $62,600.00 reducing the negligence claim verdict to $11,400.00, a new trial will not be allowed. Plaintiff should be allowed twenty (20) days to file her election under this order.

B. Outrageous Conduct Claim

Defendant seeks a new trial on plaintiff's outrageous conduct claim. The defendant first argues that the jury was not properly instructed as the Court

refused defendants' tendered instruction, "The emotional distress must be reasonable and justified under the circumstances." Defendant further argues that the damages were excessive and that the verdict was the result of bias and prejudice against the defendants. The Court disagrees with these arguments. The jury was given instructions number 20 through 23 which were directly patterned after Colorado Jury Instructions 2d, Nos. 23:1, 23:2, 23:3, and 23:4 respectively. The instructions properly define, specify and emphasis that the emotional distress suffered must be severe in character. Defendant's offered instruction was based upon but would modify standard instruction 23:4. The modification of the instruction was not required by the evidence in this

case.

The Trial Court should not and will not set aside a verdict as here entered unless it is grossly and manifestly unjust or excessive or unless it is the result of bias, prejudice or passion. The Court could not and will not, under the evidence in this case, enter such a finding.

C. Punitive Damages Claim

Defendants last seek a new trial and/or an order of remittitur as against the jury's verdict in the amount of $125,000.00 against defendants as punitive damages. Defendants argue this verdict is excessive.

While the Court does believe the award was extremely high based upon the evidence in this case, the Court cannot say or find, as a matter of law, that the

verdict is excessive or that the jury was motivated by passion or prejudice in reaching its verdict.

The jury obviously felt the defendant deserved a punitive verdict. The amount of such an award must necessarily rest in the first instance, within the discretion of the trier of fact. Palmer v. A. H. Robbins, Inc., 684, P.2d 187 (Colo. 1984). Considering the nature of the defendants' actions during the post-test interview and the deterrent the award will serve to others, the award appears within the range of the jury's discretion. While there was little information as to the defendants' economic status presented on trial, the Court believes there was sufficient evidence for the jury to infer the economic strength of the defendant and the impact

of such a punitive verdict. As such, the Motion for New Trial and/or remittitur with reference to the punitive damages claim should be denied.

Order

1. Defendants' Motion for New Trial with reference to plaintiff's negligence claim only is granted subject to the plaintiff accepting a remittitur against the verdict in the amount of $62,600.00 reducing the verdict on the negligence claim to $11,400.00. If plaintiff accepts this remittitur within twenty (20) days of this order, the Motion for a New Trial shall be denied.

2. The remainder of the defendants' post-trial motions for judgement notwithstanding the verdict, new trial and/or

remittitur are denied.

Dated this 23 day of July, 1987.

/s/ Donald W. Marshall
Donald W. Marshall, Jr.
District Court Judge

COLORADO COURT OF APPEALS

No. 87CA1322

TAMMIE R. ELLIS,

Plaintiff-Appellee,

v.

DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc. and JOHN E. REID & ASSOCIATES, INC. an Illinois corporation,

Defendants-Appellants

Appeal from the District Court
of Adams County
No. 84CV1083

Honorable Donald W. Marshall, Jr., Judge

DIVISION I
Opinion by JUDGE PLANK
Pierce, J., concurs,
Hodges*, J., dissents

JUDGMENT
AFFIRMED

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*Sitting by assignment of the Chief Justice under provisions of the Colo. Const., art. VI, Sec. 5(3), and section 24-51-1105, C.R.S. (1988 Repl. Vol. 10B).

David M. Buckley and his employer, John E. Reid and Associates, Inc., appeal the judgment entered on jury verdicts in favor of plaintiff, Tammie R. Ellis. we affirm.

John E. Reid and Associates, Inc. is in the business of conducting internal theft investigations. It was hired by the plaintiff's employer to investigate some cash shortages that had been discovered at the store where the plaintiff worked.

At the request of her employer, plain-

tiff submitted to a polygraph examination, which was conducted by Buckley and which lasted about fifteen minutes. Buckley interpreted the test results as indicating that plaintiff was being deceptive in her responses. As a result he informed her that she had "failed" the polygraph test, and he proceeded to interrogate her for over two hours in a post-test interview.

During that interrogation, according to the plaintiff, Buckley spoke in a harsh manner and repeatedly asked her if she had not stolen money or goods from her employer. She testified that apparently Buckley did not believe her denials or responses, as he badgered her throughout the interview. Buckley then reported to the plaintiff's employer that his analysis of the polygraph test indicated that

plaintiff was deceptive in her answers. As a result, plaintiff's employment was terminated. As a consequence of losing her job, plaintiff experienced insomnia and other signs of emotional distress for a period of time.

Plaintiff commenced this action, alleging that the defendants had engaged in "outrageous conduct" during the test and post-test interview, and that they were negligent in improperly reporting the results of the polygraph examination. The plaintiff also sought exemplary damages. From a judgment entered upon a jury's verdict in favor of the plaintiff on all claims, this appeal followed.

I.

Defendants contend that the trial court erred in denying their motion for a

directed verdict on the plaintiff's claim for outrageous conduct. We disagree.

To prevail on a claim of outrageous conduct, plaintiff must establish that the defendants, by extreme and outrageous conduct, intentionally or recklessly caused her severe emotional distress. Rugg v. McCarty, 173 Colo. 170, 476 P.2d 753 (1970). Outrageous conduct is that which is so "outrageous and extreme as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community." Hansen vs. Hansen, 43 Colo. App. 525, 608 P.2d 364 (1979).

The trial court is to determine in the first instance whether reasonable persons could differ on the outrageousness issue. Meiter v. Cavanugh, 40 Colo. App.

454, 580 P.2d 399 (1978). If answered in the affirmative, the question of whether conduct is sufficiently outrageous to warrant an award of damages is one for the jury.

Here, the evidence showed that Buckley escorted the 20-year-old plaintiff to a small interrogation room where he questioned her for over two hours without telling her she could leave. Although her background was exemplary and no evidence (besides the polygraph test) indicated any wrong doing, he repeatedly accused her of theft despite her constant denials, and continued the interrogation, even though she was crying, in an attempt to obtain a confession from her.

In denying the defendant's motion for directed verdict on the outrageous conduct

claim, the trial court stated that:

> "In the light most favorable to the plaintiff...I have no trouble with my duty as a judge of this court to say that the conduct would fit within the extreme and outrageous conduct."

We agree with the trial court that reasonable members of the community could conclude that defendant Buckley's conduct here was outrageous. See Rugg v. McCarty, supra. Accordingly, the trial court did not err in denying the defendants' motion for a directed verdict.

II.

Defendants next contend that the claim of negligence should not have been submitted to the jury because plaintiff failed to establish a standard of care. We disagree.

Here, to prevail on a claim of negli-

gence, the plaintiff must establish that the defendant breached a duty of care in conducting the polygraph test and in analyzing and reporting the results, thereby causing damages to the plaintiff. See Palmer v. A H. Robins Co., 684 P.2d 187 (Colo. 1984).

A legal duty to use reasonable care arises in response to a foreseeable risk of harm to others. Palmer v. A.H. Robins Co., supra. The standard of care owed by a person in the business of providing unique services to those submitting to his services is the duty to exercise the ordinary skill and competence of other persons in the business of providing similar services. See Metropolitan Gas Repair Service, Inc. v. Kulik, 621 P.2d 313 (Colo. 1980).

Here, we conclude that the evidence presented established the standard of care. Numerous expert witnesses, in the business of conducting polygraph tests, testified to the standard of care that is adhered to in the business. Furthermore, both parties' experts testified that they would have concluded that the plaintiff's test results were inconclusive. Hence, there was evidence indicating both a standard of care, and a breach of that standard, and the matter became one for the jury to resolve.

III.

Lastly, the defendants contend that the evidence in the record does not support an award of exemplary damages. We disagree.

To award exemplary damages, the wrong-

ful act must have been accompanied by a wrongful motive or a reckless disregard of the plaintiff's rights. Mari v. Wagner Equipment Co., 721 P.2d 1208 (Colo. App. 1986). An award of damages will not be disturbed on appeal unless it is completely unsupported by the record. Meiter v. Cavanaugh supra. Here, we conclude that the evidence in the record supports the jury's award, and thus, we will not disturb the exemplary damage award on appeal.

Accordingly, the judgment is affirmed.

JUDGE PIERCE concurs.

JUDGE HODGES dissents.

JUSTICE HODGES dissenting.

I respectfully dissent.

I would reverse that part of the judgment and jury ward of $48,000 for the plaintiff on her outrageous conduct claim. I perceive nothing from the plaintiff's testimony and other evidence which approaches outrageous conduct on the part of defendant Buckley during the polygraph test and subsequent interview with the plaintiff.

Viewing all the evidence in a light most favorable to the plaintiff, I cannot conclude that defendant Buckley's questions, comments, and conduct during the interview with the plaintiff were so egregious as to be actionable. That is, in my view, they were not so outrageous in character and so extreme in degree that a

reasonable member of the community would regard them as atrocious, going beyond all possible bounds of decency, and utterly intolerable in a civilized community. See Rugg v. McCarthy, 173 Colo. 170, 476 P.2d 753 (1970) and Hansen v. Hansen, 43 Colo. App. 525, 608 P.2d 364 (1979).

According to the testimony of the plaintiff, defendant Buckley at times during the post-test interview spoke to her in a harsh manner and repeatedly asked her if she had not in fact stolen money or goods from her employer. She testified that apparently he did not believe her denials. She also testified that near the conclusion of the interview she began to cry and defendant Buckley handed her a tissue and then left the room at her request. The questioning ended shortly

thereafter. I would classify this as no more than an unpleasant experience for the plaintiff who was anquished by the fact that defendant Buckley would not believe her denials of wrongdoing.

It is my strong veiw that the evidence falls far short of showing a cause of action for outrageous conduct. Hence, I would hold that the trial court erred in denying defendant's motion for a directed verdict on the outrageous conduct claim.

I would also reverse that part of the judgment awarding $125,000 to the plaintiff as exemplary damages on her claims of outrageous conduct and negligence, and remand to the trial court for a new trial on exemplary damages only. I believe the $125,000 award is not sustainable here for two reasons.

First, there is a real and significant questions of law concerning whether this plaintiff my be awarded $48,000 in damages for outrageous conduct and also be awarded $125,000 as exemplary damages for outrageous conduct and negligence. Exemplary damages and damages for outrageous conduct are both directed toward deterrence and as punishment for intentional or reckless misconduct. Therefore, it would appear that that part of the exemplary damages award applicable to outrageous conduct is duplicative of the award for outrageous conduct. On this basis, the defendant is being doubly punished.

This issue has not been specifically resolved in Colorado. In Vogel v. Carolina International, Inc., 711 P.2d 708 (Colo. App. 1985), the issue was raised ,

but not resolved in a situation in which there were two plaintiffs, one of whom was awarded punitive damages and the other was awarded damages arising out of the defendant's outrageous conduct. Under the ruling there, the duplicative damages issue, if applicable, would pertain only to cases involving a single victim.

In other jursidictions, the courts have declined to award both punitive damages and damages for outrageous conduct because they are duplicative. See, e.g. Knierim v. Isso., 22 Ill 2d 73, 174 N.E.2d 157 (1961).

Second, on the claim for negligence, the jury returned a verdict in favor of the plaintiff and awarded her damages of $74,000. In its ruling on defendants' post-trial motions, the trial court stated

that this award "is grossly and manifestly excessive considering the evidence in this case." The trial court then made a finding that the evidence of damages resulting from defendants' negligence would support an award of $11,400 and ordered a new trial on negligence damages unless plaintiff accepted a remittitur of $62,600. The plaintiff accepted the remittitur. Thus, as to the defendants' negligence, the award is now $11,400 rather than the $74,000 awarded by the jury.

Since exemplary damages or punitive damages must bear some relation to the actual damages, Frick v. Abell, 198 Colo. 508, 602 P.2d 852 (1979), the amount of exemplary damages applicable to defendant's negligence should be reconsidered

for this reason also. I also agree with the defendant's contention that there was a complete lack of sufficient evidence of the economic status of the defendants to support any substantial award of exemplary damages. Higgs v. District Court, 713 P.2d 840 (Colo. 1985).

THE COURT OF APPEALS OF

THE STATE OF COLORADO

Case Number 87CA01322

ORDER

TAMMIE R. ELLIS v. DAVID M. BUCKLEY, et al

Upon consideration of the Petition for Rehearing filed by the Appellant herein, said Petition is hereby DENIED. J. HODGES WOULD GRANT. It is ordered that issuance of the Mandate hereby be, and the same hereby is, stayed to and including 2-12-90 provided that if a Petition for Writ of Certiorari is timely filed with the Supreme Court of the State of Colorado the stay shall remain in effect until disposition of the within cause by the Supreme Court.

Plank, J.

Pierce, J.

Hodges, J.

DATED: January 11, 1990

SUPREME COURT, STATE OF COLORADO
Case No. 90SC59
Certiorari to the Colorado
Court of Appeals 87 CA 1322
Adams County District Court 84 CV 1083

ORDER OF COURT

DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc., and JOHN E. REID & ASSOCIATES, INC., an Illinois corporation,

Petitioners,

v.

TAMMIE R. ELLIS,

Respondent.

Upon consideration of the Petition for Writ of Certiorari to the Colorado Court of Appeals, and after review of the record, the briefs, and the opinion of said Court of Appeals,

IT IS THIS DAY ORDERED that said

Petition for Writ of Certiorari shall be, and the same hereby is, DENIED.

BY THE COURT, EN BANC, APRIL 30, 1990.

JUSTICE ROVIRA would grant as to the following issue:

Whether the court of appeals erred in upholding the jury's exemplary damages award.

SUPREME COURT, STATE OF COLORADO
CASE NO. 90SC59
CERTIORARI TO THE COLORADO
COURT OF APPEALS, #87CA1322

ORDER OF COURT

DAVID M. BUCKLEY, an employee of John E. Reid & Associates, Inc., and JOHN E. REID & ASSOCIATES, INC., an Illinois corporation,

Petitioners,

vs.

TAMMIE R. ELLIS,

Respondent.

Upon consideration of the Petition for Reconsideration on Denial of Petition for Certiorari and the Respondent's Motion to Strike Petitioner's Unauthorized Petition for Reconsideration of Denial of Petition for Writ of Certiorari filed in the above cause, and now being sufficiently

advised in the premises,

IT IS THIS DAY ORDERED that said Respondent's Motion to Strike shall be, and the same hereby is, GRANTED.

BY THE COURT, MAY 11, 1990.

Appeal from the District Court of
Adams, to the Colorado Court of Appeals.
Opinion issued & Judgment entered 11-16-89,
before Plank, Pierce, J., concurs
Hodges, J., Dissents

COURT OF APPEALS, STATE OF COLORADO
2 East Fourteenth Avenue, Suite 300
Denver, Colorado - 80203
(303) 837-3785

M A N D A T E

Court of Appeal No. 87CA1322
Trial Court No. 84CV1083

TAMMIE R. ELLIS vs. DAVID M. BUCKLEY ET AL

This cause came to be heard on the record on appeal from the District Court of the County of Adams and was argued by counsel, on consideration thereof, it is ordered that the Judgement of said Court is JUDGMENT AFFIRMED.

DATE: May 10, 1990 JAMES G. BENWAY
Clerk of the Court

/s/ Catherine Cunningham
Catherine Cunningham
Deputy Court Clerk

COURT OF APPEALS, STATE OF COLORADO
Case Number: 87CA1322
Trial Court No. 84CV1083

MANDATE RECALL

TAMMIE ELLIS vs. DAVID M. BUCKLEY ET AL

Pursuant to the Court's order of May 18, 1990 it is this day ordered that the Mandate issued May 10, 1990, be RECALLED.

Dated: May 18, 1990

FOR THE COURT:

/s/ James G. Benway
James G. Benway
Clerk of the Court